

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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MAY 19 1995

In the Matter of)

)
Deferral of Licensing of MTA)
Commercial Broadband PCS)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
GN Docket
ET Docket No. 92-100

DOCKET FILE COPY ORIGINAL

OPPOSITION TO REQUEST FOR STAY

Pursuant to Section 1.45(d) of the Commission's rules,¹ WirelessCo, L.P. ("WirelessCo") and PhillieCo, L.P. ("PhillieCo") hereby oppose the Request for Stay filed by the National Association of Black Owned Broadcasters, Inc. ("NABOB"), Percy E. Sutton, Individually, and the National Association for the Advancement of Colored People ("NAACP") (collectively "Minority Petitioners") with respect to the above-captioned proceeding.²

The Minority Petitioners' Request for Stay should be dismissed or denied. The Minority Petitioners' failure to comply with the Commission's rules regarding stay requests should result in a dismissal of the Request for

1 47 C.F.R. § 1.45(d).

2 WirelessCo and PhillieCo are also filing a second Opposition to Request for Stay today in response to a similar Request for Stay filed by the Minority Petitioners in the individual licensing proceedings. See Minority Petitioners' Petition to Deny and Request for Stay (filed May 12, 1995). WirelessCo and PhillieCo intend to respond to the Minority Petitioners' entire Petition to Deny and Request for Stay in a timely fashion next week.

024

Stay. Further, even if the Commission does consider the Request for Stay, the Minority Petitioners do not meet the standards for grant of a stay. For these reasons, the Request for Stay should be dismissed or denied, and the Commission should award the above-captioned licenses to WirelessCo and PhillieCo.

I. THE MINORITY PETITIONERS' VIOLATION OF COMMISSION RULES SHOULD RESULT IN A DISMISSAL OF THE REQUEST FOR STAY

The Commission's rules clearly require that any request for stay "be filed as a separate pleading."³ Any stay request not filed in this manner "will not be considered by the Commission."⁴ The Minority Petitioners' inclusion of their stay request in their Application for Review should therefore result in a dismissal of the Request for Stay without Commission consideration on the merits.

II. THE MINORITY PETITIONERS FAIL TO MEET THE ESTABLISHED STANDARD FOR GRANT OF A STAY

Even if the Commission determines that consideration of the Request for Stay on the merits is appropriate,

3 47 C.F.R. § 1.44(e).

4 Id. See also Petition by Local Distribution Co. for a Waiver of Section 21.120 of FCC Rules, 57 Rad. Reg. 2d (P&F) 1025 at ¶ 14 n.13 (1985) (dismissing and declining to consider request for stay not filed as a separate pleading); Opinion Letter from Commission to Scripps-Howard Broadcasting Co., 1985 FCC LEXIS 2864 (1985) (same).

the Minority Petitioners fail to meet the test for grant of a stay. As the Minority Petitioners acknowledge, in order to obtain a stay of the A and B block spectrum auctions, they must demonstrate that: (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm if a stay is not granted; (3) no other interested parties will be harmed if a stay is granted; and (4) the public interest favors grant of a stay.⁵ The Minority Petitioners, however, fail to satisfy even one of these four requirements.

First, the Minority Petitioners do not have a substantial likelihood of prevailing on the merits of their Application for Review. Through its usual rulemaking process, the Commission carefully considered its statutory mandate to ensure minority participation in the auctions and determined that the structure ultimately adopted best served this goal. Although the Minority Petitioners argue that holding the C block auction after the A and B block auction will result in competitive disadvantages for C block participants, the Commission explicitly found that staggered timing of the auctions would foster designated entity participation. The Commission reached this conclusion, in part, because non-designated entities who were unsuccessful in the A and B block auctions would have the incentive to

⁵ See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

establish partnerships with, or invest in, designated entities in order to gain an interest in C block licenses. Until A and B block licenses are finally awarded, A and B block participants will be unable to make final decisions about C block applicants with whom they wish to participate or in which C block markets they can participate. Moreover, staggered auctions would provide the designated entities with important information regarding the value of PCS licenses generally that would assist them in formulating bidding strategies.⁶

These auction timing and license issuance decisions were made after reviewing almost 400 comments and reply comments in the proceeding -- including NABOB's comments urging that some form of minority incentives be provided for the A and B block auctions as well as the C block auctions.⁷ The Commission considered these arguments in the context of the rulemaking and rejected them.⁸ As the Minority Petitioners have previously raised the same arguments made in their stay request, which were appropriately rejected by

6 Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report & Order, 9 FCC Rcd 5532, 5547, aff'd on recon., Fourth Memorandum Opinion & Order, 9 FCC Rcd 6858, 6863-64 (1994).

7 Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Comments of NABOB at 9-10 (filed Nov. 10, 1993).

8 Fifth Report & Order, 9 FCC Rcd at 5536.

the Commission after careful consideration, it is unlikely that the Commission will reverse its course at this point.⁹

In addition, by requesting a stay, the Minority Petitioners essentially ask that the A and B block winners not be granted a "headstart."¹⁰ The Commission already explicitly rejected this argument during the reconsideration of the rulemakings in this context.¹¹ Given the Commission's explicit findings in this regard, the Minority Petitioners have not presented any evidence that indicates a different outcome is likely here. For all of these reasons, the Minority Petitioners therefore fail to satisfy the first prong of the test for stay.

Second, the claims of the Minority Petitioners that they will be irreparably harmed without a stay are extremely speculative. The Minority Petitioners argue that C block bidders will suffer a loss of access to capital if the A and

9 See, e.g., Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 4 FCC Rcd 6476, 6477 (1989) (declining to find likelihood of success on the merits where Commission had already considered and rejected challenges identical to those raised in stay request); Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 975 (D.C. Cir. 1985) (same).

10 The term "headstart" is something of a misnomer given that the A and B block winners will be attempting to "catch up" with their competitors, the incumbent cellular providers.

11 Fourth Memorandum Opinion and Order, 9 FCC Rcd at 6863-64.

B block licenses are awarded before the C block auction. The Commission, however, has already explicitly found that this staggered timing will increase their access to capital.¹² Further, the Commission has previously found that possible financing difficulties are "far too speculative to constitute irreparable injury."¹³ The Minority Petitioners' other claims of irreparable harm -- loss of cell sites, loss of access to distributors and retailers, and loss of market share -- are extremely speculative at best, and thus provide insufficient reason for granting the requested stay.¹⁴

Third, contrary to the Minority Petitioners' arguments, the requested stay would substantially harm other parties. WirelessCo, PhillieCo and other winning bidders in the A and B block auctions have already been required to pay

12 Fifth Report & Order, 9 FCC Rcd at 5547. In initially denying this request for stay of the A and B block licensing, the Commission found similar claims of irreparable injury to be "purely speculative"; instead, the Commission found that "numerous competitive opportunities remain open" to C block participants. Deferral of Licensing of MTA Commercial Broadband PCS, 1995 FCC LEXIS 2541, at *6 (Apr. 12, 1995) ("Comm One Order").

13 Application of Satellite Television Corporation for Authority to Construct an Experimental Direct Broadcast Satellite System, 91 F.C.C.2d 953, 996 (1982).

14 See, e.g., Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (1985) (to show irreparable harm, "the injury must be both certain and great; it must be actual and not theoretical"; here, "unsubstantiated and speculative" allegations of injury lead court to deny motion for stay).

20% of their winning bids for the licenses -- an amount of over \$400 million in the case of WirelessCo and nearly \$17 million for PhillieCo. The delay requested by the Minority Petitioners after WirelessCo and PhillieCo have paid such large sums results in significant harm in the form of lost returns because the down payment money has been deposited in the U.S. Treasury rather than profitably invested elsewhere. Additionally, the A and B block winner bidders are not the only parties who would be affected by the requested stay, contrary to the Minority Petitioners' assertions. The public will also be substantially harmed by the grant of a stay because the entry of PCS providers into the wireless market is expected to significantly increase competition to the incumbent cellular providers. A delay in this competition will therefore harm customers in the form of reduced choice and, in all likelihood, higher, less competitive prices for wireless service.

Finally, a grant of the requested stay will not serve the public interest. While minority participation in the PCS auctions is one element of the public interest, the Commission was of course required to balance all elements of the public interest -- including the Congressional mandate to rapidly deploy PCS for the benefit of the public without administrative delay¹⁵ -- and it has done so, providing many

15 47 U.S.C. § 309(j) (3) (A).

significant incentives for minority participation in the process. The Commission has repeatedly found that a further delay of the A and B block licensing will harm the public interest as a whole by delaying to wireless customers the benefits arising from rapid deployment of new and innovative PCS services, including increased competition to incumbent cellular providers.¹⁶ If the Commission does consider the Request for Stay on the merits, the stay requested by the Minority Petitioners should therefore be denied.

¹⁶ See Fourth Memorandum Opinion & Order, 9 FCC Rcd at 6864; see also Comm One Order, 1995 FCC LEXIS 2541, at *7 ("We believe that the public interest in rapidly providing new competitive sources of wireless services outweighs any possible competitive harm that might result from the A and B block licensees being licensed ahead of auction winners in other PCS blocks.").

CONCLUSION

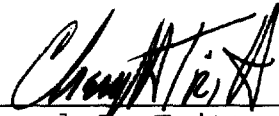
For the foregoing reasons, the Minority Petitioners' Request for Stay should be dismissed or denied.

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Dated: May 19, 1995

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I, Joan E. Neal, an attorney in the law firm of Morrison & Foerster do hereby certify that a copy of the attached Opposition to Request for Stay was served this 19th day of May, 1995 to the following persons as indicated below:

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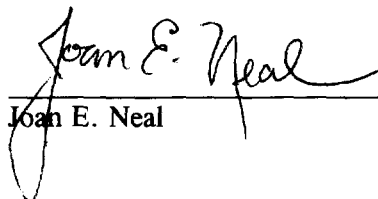
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